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Supreme Court of the United States.

OCTOBER TERM, 1971.

No. 71-1237.

ROBERT L. GALLINARO AND ROBERT BOHIGIAN,
Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JAMES E. FOLEY,
Assistant District Attorney,
Court House,
Boston, Massachusetts 02108.

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COMMONWEALTH OF MASSACHUSETTS,
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The petitioners Robert L. Gallinaro and Robert Bohigian have brought a petition for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts, entered in the above-entitled cases on December 30, 1971.

Opinion Below.

The opinion of the Supreme Judicial Court of Massachusetts is reported at 1971 Massachusetts Advance Sheets, page 1921, and is annexed hereto as Appendix "A."

Jurisdiction.

The jurisdiction of this Court is sought to be invoked pursuant to the provisions of 28 U.S.C. § 1257(3). The

judgment of the Supreme Judicial Court was entered on December 30, 1971, affirming judgments of conviction of the petitioners in the Superior Court, pursuant to which the petitioners were awarded, on March 12, 1971, sentences of fines and imprisonment.

Question Presented.

Where a warrant to search certain premises is granted pursuant to an affidavit based on surveillance of those premises, among other information, and the affidavit contains inconsequential errors or mere inadvertencies unrelated to an intention to deceive, which establish that the surveillances occurred, is the victim of the search entitled, under the Fourth Amendment of the Constitution of the United States, to have the fruits of the search suppressed as evidence against him.

Constitutional and Other Provisions Involved.

FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES—SEARCHES AND SEIZURE.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case.

A. *The Proceedings Below.*

This is a petition seeking review of a judgment of the Supreme Judicial Court of Massachusetts affirming judgments of conviction of the Superior Court of Massachusetts.

On July 8, 1970, six indictments for violations of the state wagering laws were returned against each petitioner. Motions to suppress evidence seized in a raid occurring June 13, 1970, based on alleged violation of the petitioners' rights under the Fourth Amendment, were filed on July 28, 1970. The motions to suppress were, after hearing on March 9 and 10, 1971, denied over petitioners' exceptions, and introduction of the evidence sought to be suppressed resulted in the conviction of each petitioner on five of the indictments. The trial court's findings and rulings on motion to suppress is annexed hereto as Appendix "C."

The petitioners filed their claims of appeal on March 31, 1971, and their assignments of error on June 14, 1971. One of the errors assigned, and later argued, was that denial of the petitioners' motions to suppress constituted federal constitutional error. The Supreme Judicial Court affirmed the judgments of conviction by rescript opinion dated December 30, 1971.

B. *The Facts.*

The petitioners were convicted of various gambling offenses on evidence obtained in a raid conducted by police officers on June 13, 1970, pursuant to a search warrant.

The affidavit in support of that warrant consisted of reports of surveillances of 241 Foster Street, in that part of Boston known as Brighton, information from a reliable informant relative to certain telephone numbers listed to a real estate firm at the above address, said numbers being nonpublished telephone numbers, the premises being used for illegal gaming purposes by persons registering bets on horses, and of calls made to telephones on these premises during the surveillances.

The affiant, Trooper Martin J. Headd, of the State Police, in his sworn affidavit (attached hereto as Appendix "B") stated that on May 5, 1970, he received information from

a reliable informant that certain telephone numbers were being used for illegal gaming purposes by persons registering bets on horses. On May 6, 1970, his check with the New England Telephone Company showed the numbers in question were those of a real estate office located at 241 Foster Street, also that all the telephone numbers were nonpublished ones. On the same date the officer placed the address, a two-family wooden framed house, under surveillance and observed two vehicles, registration numbers N92-279 and 416-40Z. He stated a check with the Registry of Motor Vehicles revealed N92-279 to be registered to Richard Brown, 330 Lincoln Street, Waltham, Massachusetts, and registration 416-40Z to be registered to Robert Gallinaro, 29 Lawndale Street, Belmont, Massachusetts (one of the petitioners herein), both vehicles being Cadillac sedans. The affiant in his affidavit also referred to the automobiles on May 7, 1970, as Cadillac sedans—same registration numbers as stated above. During further surveillance on May 14, 20, 26, June 5, and June 9, 1970, whenever reference was made to the motor vehicles in question they were referred to as vehicles registered to Brown and Gallinaro or the Gallinaro vehicle, no further mention of Cadillacs. Also he stated that on June 9, 1970, when Gallinaro left the premises he contacted Sgt. John Clemens of the State Police who immediately called one of the nonpublished numbers of the real estate office and asked for and received accurate information regarding the results of the fourth race at Suffolk Downs (a race track in East Boston, Massachusetts).

During the hearing on the motion to suppress there was testimony introduced by petitioners that Brown had traded a Cadillac to Allen Buick Company toward a 1970 Buick on April 24, 1970, and the registration plate, number N92-279, the same number given by the affiant in his affidavit, was transferred to the Buick on April 27, 1970.

Trooper Headd also referred to the Cadillac bearing registration number 416-40Z as being registered to Robert Gallinaro of 29 Lawndale Street, Belmont, whereas it was shown to have been registered to Elizabeth Gallinaro. No evidence was introduced to show whether or not the officer was familiar with the petitioners prior to the start of the surveillance, or whether or not Robert Gallinaro was known as "Bob" and Robert Bohigian was known by some other nickname.

It was and is argued by petitioners that it was impossible for the trooper to obtain information on May 6, 1970, from the Registry of Motor Vehicles that registration number N92-279 was a Cadillac registered to Richard Brown, due to the fact that he had changed the registration to a Buick on April 27, 1970. The registration numbers given were the correct numbers and the only misinformation given was that it was a Cadillac, whereas petitioners claim that on May 6, 1970, it was a Buick.

Reasons for Denying the Writ.

THE COURT BELOW, AFTER A FULL AND IMPARTIAL HEARING ON THE MOTION TO SUPPRESS, CAME TO THE PROPER DECISIONS ON THE FACTS AS PRESENTED.

There is no question that up to April 27, 1970, Brown owned a Cadillac with the registration plate N92-279, or that a Cadillac with the registration plate 416-40Z was registered to one Elizabeth Gallinaro.

The respondent contends that there is a clear and logical answer to these so-called errors, that on May 6, 1970, the affiant called the Registry of Motor Vehicles and received some misinformation which, considering the short time that elapsed between April 27 and May 6, 1970, it is more than probable that some of the agency's records were not

brought up to date. Further there is no proof that the Cadillac in question stayed at the Buick Company every day during the period from April 27, 1970, to June 18, 1970, when it was sold. There can be no doubt the affidavit is sufficient on its face. Petitioners in fact agreed with this when they only argue that the motion to suppress should be allowed because of "deliberate misrepresentations" and "lies." Respondent agrees that an affidavit made up of deliberate representations and lies used to "dupe the magistrate" might very well vitiate the warrant.

As required by the Fourth Amendment the existence of probable cause was determined by a neutral and detached justice and not the officers involved in the case. *Johnson* v. *United States*, 333 U.S. 10 (1948). The affidavit was signed, sworn to, and contained ample facts to enable the magistrate to determine that probable cause existed.

Here the trial court, after hearing the affiant testify relative to the motion to suppress, found (his findings are attached hereto as Appendix "C") that the so-called errors "were not false representations but inadvertencies unrelated in any way to an intention to deceive."

There is no question of recency as decided in *SGRO* v. *United States*, 287 U.S. 206 (1932). Last observations on June 9, 1970; warrant sworn to June 12, 1970.

Respondent contends the only argument put forth by petitioners in their petition is the inconsequential reference to both automobiles being Cadillacs and that one was registered to Elizabeth Gallinaro and the claim that on May 6, 1970, Brown had a Buick rather than a Cadillac. The affiant, as shown in his testimony as elicited by petitioners, was interested mainly in the description of the occupants of the automobiles in question and not the make of the automobile, both cars being the products of the same manufacturing company. He put the information into the affidavit that he had received from the Registry of Motor

Vehicles. The inadvertency, if it was one, was the statement of the Registry and not of the affiant and fails to show any bad faith on affiant's part.[1]

THE CASE PRESENTS NO SIGNIFICANT QUESTION OF LAW.

Certiorari should be denied, even on petitioners' assumptions, because the case is of no general importance, as required by Rule 19 of the Supreme Court Rules:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor . . . ."

Only if the matter sought to be reviewed is one of importance beyond the immediate parties or its resolution would offer guidance to federal courts should certiorari be granted. *Magnum Import Co., Inc.* v. *Coty,* 262 U.S. 159. *Layne & Bowler Corp.* v. *Western Well Works, Inc.* 261 U.S. 387.

Even on petitioners' assumptions, unsupported by the findings below, that there was a misrepresentation of fact in Officer Headd's application and that it was deliberate and that the whole of the application should be suspected as concoction—assumptions both courts below have rejected—no new law could result from the case, since the knowing use of false testimony is ground for relief. Unless falsity and lying among law enforcement applicants is widespread, the case, even on petitioners' assumptions, is *sui*

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[1] *Rugendorf* v. *United States,* 376 U.S. 528, 533. "Since the erroneous statements that petitioner was the manager of Rugendorf Brothers Meat Market and was associated with Leo in the meat business were not those of the affiant, they fail to show that the affiant was in bad faith or that he made any misrepresentations to the Commissioner in securing the warrant."

generis, and of no importance except to the parties, either in law or fact.

The rights of the parties are sufficiently protected by the trial court and review by the appellate court, and an appeal to the Supreme Court of the United States on a writ of certiorari should be allowed when consideration would be in the public interest. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70. *Maryland* v. *Baltimore Radio Show, Inc.* 338 U.S. 912. None appears here.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,
For the Respondent,
JAMES E. FOLEY,
Assistant District Attorney,
Suffolk County, Massachusetts.

Appendix A.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
AT BOSTON,

December 30, 1971.

IN THE CASE OF

COMMONWEALTH

v.

ROBERT L. GALLINARO

(and nine companion cases)

pending in the Superior Court for the County of Suffolk

ORDERED, that the following entry be made in the docket; viz.,—

Judgments affirmed.

BY THE COURT,

FREDERICK J. QUINLAN, Clerk.

December 30, 1971.

Brief statement of the grounds and reasons of the decision:

The defendants, after trial before a judge sitting without a jury, were convicted of various gaming offences. Their appeals are before us under G.L. c. 278, §§ 33A-33G. The judge denied motions to suppress evidence taken under a search warrant issued by another Superior Court judge upon the basis of an affidavit submitted by a State police officer. The affidavit reported extended surveillance of premises in Brighton and of telephone calls to those premises. The defendants contend that errors in setting out motor vehicle registration numbers and descriptions of vehicles

cast such doubt on the truth of the affidavit as to indicate that it was intentionally false and that, in fact, no surveillance took place on the dates mentioned. After hearing largely oral evidence, the judge found "that the errors . . . were not false representations but inadvertences unrelated . . . to an intention to deceive." He in effect inferred that the errors may have been caused by "erroneous information furnished by the Registry of Motor Vehicles," or by "an inconsequential error of observation." He concluded (1) that the errors were insignificant, (2) that the evidence did not demonstrate the affidavit was not "in good faith," and (3) that it was "based on facts sufficient . . . to establish probable cause." Our review of the evidence, which need not be stated here, shows that his findings and conclusions were well warranted. See *Commonwealth v. Murray*, Mass. , — .[a] There was no need to furnish the defendants a transcript of the State police officer's grand jury testimony. It was examined by the judge and marked for identification. That transcript has also been examined here. Compare *Commonwealth* v. *De Christoforo*, Mass. , — , fn. 2,[b] where the disputed grand jury minutes were not marked for identification. Other assignments of error are not argued. See S.J.C. Rule 1:13, 351 Mass. 738.

Judgments affirmed.

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[a] Mass. Adv. Sh. (1971) 887, 892-893.

[b] Mass. Adv. Sh. (1971) 1707, 1710-1711, fn. 2.

Appendix B.

THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court

AFFIDAVIT

I, Martin J. Headd, being duly sworn, depose and say:

1. I am a Trooper in the Massachusetts State Police and have been assigned to the Special Service Unit, General Headquarters, Boston, Mass. since February of 1968 for the purpose of investigating illegal gaming activities throughout the Commonwealth.

2. I have information as follows:

On May 5, 1970 I received information from a reliable informant who has supplied reliable information in the past relative to illegal gaming activities, which have led to the arrest and conviction of individuals involved in illegal gaming. This reliable informant told me that telephone numbers 783-1036 and 783-1037 were being used for illegal gaming purposes by persons registering bets on horses.

On May 6, 1970 I made a check with the New England Telephone Co. and found that the telephone numbers 783-1037 and 783-1036 were listed to the Foster Real Estate at 241 Foster St., Brighton, Mass. The New England Telephone Co. records further showed that another phone was also listed to the Foster Real Estate at 241 Foster St., Brighton, Mass. and that that number was 783-1038 and all three numbers 783-1036, 783-1037 and 783-1038 were all non-published phones.

On this date this officer located and placed under surveillance 241 Foster St., Brighton, Mass. At approximately 6:10 PM this officer observed two white males leave the front door at 241 Foster St., Brighton, Mass. and enter two vehicles, Mass. Reg. N92-279 and Mass. Reg. 416-40Z. A

later check with the Mass. Reg. of Motor Vehicles revealed N92-279 to be registered to Richard Brown 330 Lincoln St., Waltham, Mass. and Mass. Reg. 416-40Z to be registered to Robert Gallinaro 29 Lawndale St., Belmont, Mass. both vehicles being Cadillac sedans. On this same date this officer kept 241 Foster St., Brighton, Mass. under observation until approx. 8:45 PM noting no further traffic in or out of 241 Foster St., Brighton, Mass. during that time.

On May 7, 1970 this officer placed 241 Foster St., Brighton, Mass. under surveillance from approx. 11:00 AM to 2:30 PM. At approximately 11:35 AM a Cadillac Sedan Mass. Reg. 416-40Z registered to Robert Gallinaro arrived and the male operator entered 241 Foster St., Brighton, Mass. At approximately 11:45 AM a Dodge S/W Mass. Reg. R20-966 arrived and the male operator entered 241 Foster St., Brighton, Mass. A later check with the Reg. indicated this vehicle was registered to one Robert Bohigian of 10 Branchaud Rd., Belmont, Mass. Several minutes later a Cadillac sedan Mass. Reg. N92-279 registered to Robert Brown pulled up, parked and the male operator entered 241 Foster St., Brighton, Mass. At approx. 2:10 PM a tall, black haired male left the front door of 241 Foster St., Brighton, Mass., entered the Cadillac sedan registered to Robert Gallinaro and left the area toward the direction of Brighton Center. On this same date this officer checked 241 Foster St., Brighton, Mass. between the hours of 6:30 PM and 8:30 PM. During this time the vehicles registered to Brown and Gallinaro were observed parked in front of 241 Foster St., Brighton, Mass. At 8:10 PM the lights in the rear of the first floor went out and the two male subjects almost immediately came out the front door. One subject entered the vehicle registered to Robert Brown and the second entered the vehicle registered to Robert Gallinaro, both vehicles left the area in the direction of Brighton Center. This officer then went to a pay phone and dialed

telephone numbers 783-1036, 783-1027 and 783-1038, let each phone ring for approx. 10 rings and received no answer to any of the above numbers dialed.

On May 14, 1970 this officer checked 241 Foster St., Brighton, Mass. at 8:25 PM and found the lights were on

M.J.H.

in the rear of the first floor and the vehicles registered to Brown and Gallinaro were parked in front of 241 Foster St., Brighton, Mass. A later check at 11:05 PM to 11:45 PM revealed the vehicle registered to Brown in front of 241 Foster St., Brighton, Mass. At approx. 11:35 PM the male subject left the front door at 241 Foster St., Brighton, Mass. and entered the vehicle registered to Robert Brown and left the area. This officer, at 11:45 PM, called telephone number 783-1036, 783-1037, 783-1038 and received no answers.

On May 20, 1970 at approx. 10:10 AM this officer checked 241 Foster St., Brighton, Mass. and found no vehicles out front. This officer then placed three calls to the numbers 783-1036, 783-1037 and 783-1038 all listed to Foster Real Estate 241 Foster St., Brighton, Mass. and received no answers. At approx. 10:55 AM the Station Wagon registered to Robert Bohigian pulled up in front of 241 Foster St., Brighton, Mass. and the male operator entered the front door at 241 Foster St., Brighton, Mass. This officer made a phone call to 783-1036 at 11:10 AM and the phone was answered on the first ring by a male. This officer asked for Billy and the male answering said there was no Bill there and suggested this officer had the wrong number.

On May 26, 1970 at approx. 9:50 this officer checked 241 Foster St., Brighton, Mass. and found no vehicles parked in front of this address. Calls placed by this officer to numbers 783-1036, 783-1037 and 783-1038 listed to Foster Real Estate 241 Foster St., Brighton, Mass. received no

answer at 9:55 A.M. This officer checked 241 Foster St. at 1:30 PM this same date and found three vehicles parked in front of 241 Foster St., Brighton, Mass. these vehicles being Mass. Reg. 416-40Z registered to Robert Gallinaro, Mass. Reg. R20-966 registered to Robert Bohigian, and a green Dodge van Mass. Reg. F7176 registered to Rainbow Coat and Linen 160 Lawton St., Brookline, Mass. This officer placed two calls at 1:40 PM to 783-1037 and 783-1038 and received busy signals on both lines.

On June 5, 1970 at approx. 10:10 AM this officer made a call to telephone number 783-1037 and received no answer. The building at 241 Foster St., Brighton, Mass. was placed under surveillance from 10:15 AM until 12:15 PM. This officer observed the Gillinaro vehicle arrive at approx. 11:05 AM and the male operator entered the front door of 241 Foster St., Brighton, Mass.

On June 9, 1970 at approx. 12:45 PM this officer checked 241 Foster St. Brighton, Mass. and found two vehicles in front of the building these being Mass. Reg. 416-40Z the Gillinaro vehicle and Mass. Reg. G99-812. A check with the Mass. Reg. of Motor Vehicles showed Mass. Reg G99-812 to be registered to Rose Boghigian of 8 Branchoud Rd., Belmont, Mass. This officer kept 241 Foster St., Brighton, Mass. under surveillance from 1:10 PM until 3:35 PM. At approx. 3:25 PM this officer observed a male subject was observed leaving the front door of 241 Foster St., Brighton, Mass. and enter a vehicle parked in front of the building bearing Mass. Reg. 416-40Z, the Gillinaro vehicle. This vehicle left the area. This officer immediately contacted Sgt. John Clemens also of the Special Service Unit, General Headquarters, Boston, Mass. who in turn placed a phone call immediately to telephone number 783-1036. The phone was answered on the first ring by a male subject and the following conversation took place:

Male voice: "Ya"

Sgt. Clemens: "Is Bob there".

Male voice: "No he just left. Who's this"

Sgt. Clemens: "Red" I was afraid I'd miss hime. Do you have the fourth at Suffolk"·

Male voice: "Ya, one four six.

Sgt. Clemens: "Thanks" and Sgt. Clemens hung up.

A check of the National Armstrong Daily News for this date by this officer revealed Armstrong horses in the 4th race at Suffold Downs to be 1—Cenacle's Image, 4—Shemya, 6—Double Pass.

On June 10, 1970 this officer checked the National Armstrong Daily News for results for June 9, 1970 and found the fourth race at Suffolk Downs went at 3:11 PM and the following horses won Cenacle's Image 3.80, 2.60, 2.20, Shemua paid 2.80 and 2.20, Double Pass paid 2.80.

M.J.H.

3. Based upon the foregoing reliable information and upon my own personal knowledge there is probable cause to believe that the property hereinafter described may be found in the rooms of the first (1) floor and cellar of the Two (2) story, two (2) family, wooden framed house, color brown with a painted cream trim, situated and numbered 241 Foster Street, in that part of Boston known as Brighton, and within judicial district of the Municipal District Court of Brighton.

4. The property for which I seek issuance of a search warrant is the following:

Books, apparatus and devices used for the purpose of registering upon the speed, trial, or endurance of a beast, to wit, horses: and the buying and selling of pools, including; monies and all lottery tickets, a share of a ticket, or any writing, certificate, bill, token, or any other device used in the furtherance of a lottery.

WHEREFORE, I respectfully request that the Court issue a warrant and order of seizure, authorizing the search of the

rooms of the first (1) floor and cellar of the Two (2) story, Two (2) family, wooden frame house, color brown with a painted cream trim, situated and numbered 241 Foster St., in that part of Boston known as Brighton, and directing that if any such property or evidence or any part thereof be found, that it be seized and brought before the Court, together with other such and further relief that the Court may deem proper.

Signed under the penalties of Perjury

MARTIN J. HEADD
State Police Officer

Then personally appeared the above named, Martin J. Headd, and made oath that the foregoing affidavit, subscribed, by him is true.

Before me, this 12th day of June 1970

ROBERT H. BEAUDREAU
of the Middlesex Superior Court

A true copy Attest:
[Seal] Mary C. Daly
Clerk.

July 9, 1971.

Appendix C.

Findings & Rulings on Motion To Suppress

I find that the errors contained in the Affidavit were not false representations but inadvertencies unrelated in any way to an intention to deceive.

The language in the Affidavit, under date of May 6, 1970, to the effect that "both vehicles being Cadillac Sedans," follows the information furnished by the Registry of Motor Vehicles and, hence, the inference can properly be drawn that the description of the Cadillacs was erroneous information furnished by the Registry of Motor Vehicles.

No proof of substance has been furnished that the observation by the Officer thereafter of the cars as a Cadillac was anything but an inconsequential error of observation, possibly influenced in part by the original error.

With respect to identification of the Gallinaro car as being that of Robert Gallinaro, whereas it was registered to his wife, or some other female, Elizabeth Gallinaro, this does not in and of itself indicate lack of good faith.

I find the errors were inconsequential on matters which were not the only basis of probable cause of illegal gambling on the premises and were not made to induce the Magistrate to issue the search warrant, nor has there been any evidence before me that in fact the Magistrate was deceived to grant the search warrant.

I find there was insufficient evidence to demonstrate the Affidavits were not made in good faith.

I further find the Affidavit was based on facts sufficient as a matter of law to establish probable cause. And I further find that the premises authorized to be searched did not exceed the showing of probable cause.

The Defendants' Motions to Suppress are denied.

(s) David A. Rose
Justice of the Superior Court

March 12, 1971—Filed